IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 148/2002

M/s. Gabriel S. Rodrigues (deceased)
through his legal heirs.

a) Mrs. Deanna Victoria Rodrigues, widow,
major, r/o. Chinchinim, Dandeavaddo,
Salcete, Goa,

b) Mr. Giles Anthony Carlos Rodrigues,
son of late Gabriel Rodrigues, major,
r/o. Chinchinim, Dandeavaddo, Salcete, Goa,

c) Mrs. Audrey Maria Rodrigues,
wife of Mr. Giles Rodrigues, major,
r/o. 196, Pressed Brick Drive,
Brampton, Ontario, Canada,

d) Mrs. Susan Marian Anthoniete D'Souza,
d/o. Late Gabriel Rodrigues, major,
r/o. Fradiliem, Navelim, Salcete, Goa,

e) Mr. Anthony Brian Isidore Felix
D'Souza h/o. Mrs. Susan Maria A. D'Souza,
r/o. Fradiliem, Navelim, Salcete, Goa.

f) Mrs. Zarine Carol Judith Pereira
d/o. Late Gabriel Rodrigues,
r/o. Allewaddo, Chinchinim,
Salcete, Goa.

g) Mrs. Donald Cyril Maria Gomes Pereira,
r/o. Mrs. Zarine Carol Judith Pereira
r/o. Allewaddo, Chinchinim, Salcete, Goa. ..... Appellants.

V/s.

Shri Jose Marcus Caetano Fernandes
major, son of Caetano A. Fernandes,
Pulvaddo, Requeno, H.No. 421,
Benaulim, Salcete, Goa. ..... Respondent.

Ms. Leena Dharwadkar, Advocate for the appellants.

Mr. S. D. Lotlikar, Senior Advocate with Mr. M. D'Souza, Advocate for the respondent.

CORAM : P.V. KAKADE, J.

DATE : 25TH AUGUST, 2006.

ORAL JUDGMENT :

The appellant-defendant has preferred this appeal against the Judgment and Order passed by the Additional Civil Judge, Senior Division, Margao against whom the suit was partly decreed and he was directed to pay to the plaintiff the sum of Rs.1,10,000/- with interest at the rate of 15 % per annum from the date of filing of the suit till realisation, though the plaintiff's suit for specific performance came to be dismissed.

2. The plaintiff-respondent filed the suit for specific performance and alternatively for compensation with a case that sometimes on or about 8.8.1988, he approached the defendant in its office at Margao in order buy a flat in the residential building constructed by the defendant who which was in construction business. The appellant-defendant showed to the plaintiff plans of various construction sites and one site amongst others was the construction site at Gogol at Housing Board, Margao. The

plaintiff agreed to purchase the flat containing a dinning room-cum-living room, one bedroom, a kitchen with service verandah, a bathroom and a toilet having an area of 60 sq. metres for a total consideration of Rs.1,15,000/-. On or about 20.4.1988, the plaintiff paid to the defendant as earnest money an amount of Rs. 35,000/- and the defendant promised to execute the written agreement, however, for some reason or the other, it got postponed and the written agreement was not executed. The defendant by its letter dated 27.8.1988, however, confirmed having received the said amount from the plaintiff. Since the plaintiff was short of money, he approached the Margao Urban Co-operative Bank to obtain a loan from mortgaging his own some other property at Benaulim surveyed at cadastral survey No. 129/4. On mortgaging the said property, the Bank issued him a pay order for Rs.75,000/- towards the payment of flat to be delivered to the plaintiff and the defendant had already received the amount of Rs.75,000/-. After 5.9.89, the plaintiff at various times approached the defendant with a request to deliver him the flat, however, the defendant went on delaying the matter on one pretext or the other, and when the plaintiff realised that the defendant was avoiding to complete the transaction, notice dated 19.12.1988 came to be issued requesting the defendant to fix the date to execute the document of transfer in respect of the said flat in the name of the plaintiff and in the alternative to return the

money received from the Bank and also received from the plaintiff amounting to Rs.1,15,000/-. In the said notice, the plaintiff also reiterated that he was ready and willing to pay the balance of Rs.5,000/- on execution of the document of transfer, however, the defendant though received the notice, did not even reply the said notice.

3. The defendant resisted the claim, inter alia, denying the allegation made by the plaintiff with the submission that the plaintiff was a professional money lender and speculator and that for his own purpose, he secured the loan from the Bank, but the same was not for the purpose of purchasing of the flat from the defendant. That the amount he had received by virtue of the pay order was not in respect of payment of the flat. The defendant has tried to make out a specific case that one Advocate Shri R.S. Naik from Margao was negotiating the purchase of the flat in Suzan Building at Aquem, Margao which was duly constructed, developed and owned by the defendant for the value of Rs.2,40,000/- and the negotiations were in progress. The said Mr. Naik approached the defendant informing that one Shri Marcus Fernandes was granted a loan for the purchase of flat by Margao Urban Co-operative Bank Ltd. and that Advocate Shri Naik had to get substantial sum from the said Mr. Fernandes and he requested the defendant to help Mr. Naik by issuing an advance receipt in the name of

Marcus Fernandes to facilitate the receipt of the said loan. In order to help Advocate Naik and on the basis of the draft prepared by him, the defendant issued a letter in the name of said Marcus Fernandes stating that the defendant had received the sum of Rs.35,000/- without receiving any consideration of money and in order to help the said Shri Naik and the plaintiff to collect the loan and to adjust their account on the guarantee and trust reposed by the defendant on Advocate Naik and knowing that the Bank would issue the pay order in favour of the defendant.

4. Accordingly, on 10.9.1988, the said Advocate Shri Naik produced the plaintiff in the Office of the defendant with the Bank pay order and at that time, the defendant saw the plaintiff for the first time and in the presence of all the three parties, the transaction was finalised, for which transaction, the plaintiff was assisted by Advocate Naik and another person in their company instructed the defendant to divide the said amount of Rs.75,000/- amongst three persons, including Advocate Naik. Accordingly, on plaintiff's confirmation, the defendant issued a cheque for Rs.10,000/- to Esther Vaz, and for the sum of Rs.15,000/- to one Martin Vaz, both nominees of the plaintiff on the very same day i.e. 10.9.1988 drawn on the Central Bank of India. The cheques were duly encashed across the counter of Central Bank and the fraud and fraudulent dealing by the plaintiff was

thus self explanatory and for which purpose the defendant is not responsible. It is further the case sought to be made out by the defendant that in accordance with the directions issued by the plaintiff, the defendant agreed to pay to Advocate R.S. Naik the balance sum of Rs.50,000/- of the said pay order which sum Advocate Shri Naik had invested with the defendant for the purpose of purchase of Flat. The defendant has further spell out its difficulties to the effect that it had agreed to accept on behalf of Advocate Naik and that it had undertaken to pay interest at the rate of 15 % per annum on the balance sum due and payable to the defendant when the defendant gives possession of the said flat which he occupies at the moment. The defendant further averred that the plaintiff's suit was bad for non-joinder of necessary and proper parties to the suit. Therefore, on such other grounds, the suit was sought to be dismissed.

5. On the basis of the of the available pleadings and the evidence on record, issues were settled by the lower Court and the dispute came to be adjudicated. The learned trial Judge was of the view that though the plaintiff had succeeded in establishing that he was entitled to specific performance of the contract and the defendant had failed to establish its defence, still by virtue of Section 20 of the Specific Relief Act the plaintiff was not entitled to specific performance of the contract, but was entitled to

alternative relief, i.e. refund of earnest amount and compensation to the extent it was paid to the defendant with interest at the rate of 15 % per annum and as such, the suit was partly decreed with the observation that the specific performance of the contract was rejected. Hence, the appeal came to be filed.

6. At the outset, after hearing both the parties at length, it must be noted that the entire dispute involved between the parties revolves around a monetary transaction, to which one Shri R. S. Naik was a pivotal person. Unfortunately, the plaintiff did not examine the said Mr. Naik as his witness and, as such, the entire transaction sought to be established has remained to be proved on record. No doubt that the trial Court has critically appreciated the evidence through which I was also taken and I prefer to concur with the finding recorded by the trial Court holding that the offer and acceptance between the parties was absolutely unqualified and unconditional and the element of contract between the parties was proved by the plaintiff which showed that the defendant had committed the breach of the said contract. The plaintiff inspite of showing his readiness and willingness to perform his part of the contract, the defendant did not come forward to execute the document of transfer and, therefore, in normal course the plaintiff would have succeeded in seeking a decree for

specific performance of the contract. However, the lower Court has rightly come to the conclusion that it was a fit case to invoke the provisions of Section 20 of the Specific Relief Act, especially in view of the fact that the plaintiff in his pleadings or in his evidence did not identify the flat under dispute with all details. He did not place on record the plans showing the location of the flat, nor did he mention on which floor the same was existing. It is also not his case that the same is located on the ground floor or elsewhere. In other words, the identification of the flat has remained to be established. The position is further complicated when it is seen that there is no whisper in the evidence of the plaintiff that the said flat was vacant on the date of the suit because the evidence also discloses that in all probabilities the said flat has been transferred in the name of Advocate Shri R. S. Naik and he is occupying the same. Having regard to these aspects, the lower Court appears to have rightly refused the decree for specific performance, to which aspects I totally concur.

7. The defendant has also raised a question in respect of non-joinder of parties. However, I am satisfied that such a defence would not be available for the defendant, especially when the contract appears to be between the plaintiff and the defendant. At the most, those persons, including Advocate Shri R. S. Naik could be the vital witnesses for the

parties in order to throw light on the factual aspects involved in this case. But, neither the plaintiff nor the defendant chose to examine Advocate Shri Naik as witness without cogent explanation. In view of this position, I am inclined to hold that the order passed by the trial Court appears to be just, legal and proper which would brook no interference at all.

8. In the result, the appeal fails. The Judgment and Order passed by the trial Court stands confirmed. The entire decretal amount which is deposited in this Court at the time of admission of this appeal shall be paid to the respondent and shall be adjusted towards the payment to be made after calculating interest amount decreed in favour of the said party. With these directions, the appeal stands disposed of with no order as to costs.

P.V. KAKADE, J.

ssm.